No. 6126

United States

Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

FRANCES MACKINNON PUSEY, GEORGE G. MACKINNON, WILLIAM H. MACKINNON, JR., FRANCES MACKINNON COIT and JOHN S. DELANCEY, Guardian of JOHN MACKINNON DELANCEY, a Minor,
Appellees.

Supplemental Transcript of Record.

Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

The Filmer Bros. Electrotype Co., San Francisco—11—24—30—60

No. 6126

United States

Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

FRANCES MACKINNON PUSEY, GEORGE G. MACKINNON, WILLIAM H. MACKINNON, JR., FRANCES MACKINNON COIT and JOHN S. DELANCEY, Guardian of JOHN MACKINNON DELANCEY, a Minor,
Appellees.

Supplemental Transcript of Record.

Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

The Filmer Bros. Electrotype Co., San Francisco—11—24—30—60

INDEX TO THE SUPPLEMENTAL TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

In the Southern Division of the United States District Court for the Northern District of California.

No. 18,342—K.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FRANCES MACKINNON PUSEY, GEORGE G. MACKINNON, WILLIAM H. MACKINNON, Jr., FRANCES MACKINNON COIT, and JOHN S. DELANCEY, Guardian of JUNE MACKINNON DELANCEY, a Minor,

Defendants.

PETITION FOR NEW TRIAL.

Comes now the plaintiff United States of America in the above-entitled action and moves the Court to set aside and vacate the verdict of the jury in said action and grant a new trial for the following reasons:

1. Errors of law occurring at the trial as follows:

(a) The Court erred in failing to instruct the jury that the counterclaim set up in defendants' answer to the amended complaint was withdrawn from their consideration.

(b) The Court erred in giving the following instruction:

"If you find from the evidence that these deeds of gift were made in good faith, and not in contemplation of death, and were intended to take effect in possession and enjoyment immediately during the lifetime of the decedent, then your verdict should be for the defendants in this case."

2. Said verdict has no evidence to sustain it.

3. Said verdict is not sustained by the evidence.

4. The great preponderance of the evidence is against the verdict. [1*]

Said petition will be presented upon the minutes of the court, upon the transcript of testimony, and upon all the pleadings, papers and records in the above-entitled cause.

The plaintiff specifies the following particulars wherein the verdict is not sustained by the evidence and which are relied upon by it in this petition for new trial:

1. That there is no evidence to show that the said claim was presented to the Treasury Department prior to the trial and no evidence that the defendants did not have time to present said claim to the Treasury Department and obtain a ruling on same prior to trial.

2. That there is no evidence of any conversation with the deceased at or near the time that the said transfers were made which would tend to show the deceased's intention; and no evidence of the demeanor of the deceased at or near the time said

*Page-number appearing at the foot of page of original certified Supplemental Transcript of Record.

transfers were made which would tend to show the intention of the said deceased William H. Mackinnon in regard to the said transfers.

3. The evidence shows that the value of the whole estate less deductible expenses amounting to $496,496.24 and that the value placed upon said transfers by the Commissioner of Internal Revenue was $387,968.93. Since the tax on the net estate with the said transfers included in the net estate would amount to $13,359.85, and since the tax on said estate with the said transfers excluded from the said net estate would amount to $670.55, it is plain to be seen that the verdict of the jury was not sustained by the evidence to the extent of $670.55 plus seven per cent interest thereon from the 2d day of November, 1925; and the jury therefore should have at least returned a verdict in favor of plaintiff for the latter amount. [2]

WHEREFORE, your petitioner prays that the judgment and verdict be set aside and a new trial granted.

GEO. J. HATFIELD,
United States Attorney,
Attorney for Plaintiff. [3]

[Title of Court and Cause.]

POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR NEW TRIAL.

Petition for new trial lies in federal practice and can be made upon the following grounds:

1. Court erred in stating the law;
2. Verdict not sustained by the evidence;
3. Verdict has no evidence to sustain it;
4. Great preponderance of evidence is against the verdict;
5. Verdict due to passion, prejudice, or partisan feeling.

Pringle vs. Guild, 119 Fed. 962.

Murhard vs. Portland Company, 163 Fed. 194.

Nor is motion for new trial in the federal courts affected by the Conformity Statute, 28 U. S. C. 391, note 2.

I.

(a) FAILURE TO INSTRUCT THE JURY THAT COUNTERCLAIM HAD BEEN WITHDRAWN FROM THEIR CONSIDERATION:

This is an action for debt to recover public moneys and is not an action to recover taxes. [4]

United States vs. Lora Pratt Kelly, 30 Fed. (2d) 193.

Therefore, Section 951 Revised Statutes (28 U. S. C. 774), applies. This section reads as follows:

"In suits brought by the United States against individuals, no claim for a credit shall be admitted, upon trial, except such as appear to have been presented to the accounting officers of the Treasury, for their examination, and to have been by them disallowed, in whole or in part, unless it is proved to the satisfaction of

the court that the defendant is, at the time of the trial, in possession of vouchers not before in his power to procure, and that he was prevented from exhibiting a claim for such credit at the Treasury by absence from the United States or by some unavoidable accident."

Defendants' failure in the first instance to allege that the condition precedent (presenting claim for allowance) had been complied with and their failure to ultimately prove that the said counterclaim had been presented to the Treasury Department deprives the defendants of the right to have the jury consider the said counterclaim.

That an allegation of presentation of the claim is requisite in order to state a cause of action on counterclaim is supported by the decision in

United States vs. Patterson, 91 Fed. 854,

where the Court said at page 855:

"The claim made by the defendant, whether called 'credit' or 'set-off,' should be so stated in the pleading as that the claim is, on the face of the pleading, provable. Under the statute quoted, the claim is provable only when proper presentation has been made, and disallowance in whole or in part followed. Therefore the claim is not properly pleaded, unless such presentation and disallowance are also pleaded. The statute quoted has frequently been before the courts for construction and application. U. S. vs. Giles, (1815) 9 Cranch, 212, 236; Walton vs. U. S., (1824) 9 Wheat. 651, 653; Watkins vs. U. S., (1869) 9 Wall. 759, 765; Halliburton vs.

[5] U. S., (1871) 13 Wall. 63, 65; Railroad Co. vs. U. S., (1879) 101 U. S. 543, 548,—are cases wherein the provisions above quoted (of Section 951, Rev. St.), or similar provisions, have been under consideration and sustained by the supreme court."

Therefore, defendants' counterclaim does not state a cause of action.

Any offer of proof of the presentation of said claim to the Treasury Department could have been objected to when made on the ground that there was no allegation in defendants' pleading to support defendants' proof thereunder. But in this case the objection was unnecessary because defendants failed to make any offer for the good reason that they had no evidence of any presentation of the said claim. No evidence appearing to show that a presentation of the claim as required by the section had been made, the proof offered in support of the contention made in the counterclaim should have been excluded and the counterclaim withdrawn from the consideration of the jury.

United States vs. Gilmore, 74 U. S. 491.

There the Court said, at page 494:

"When the defendants failed to produce the evidence necessary to warrant the introduction of such testimony, *all which* had been given should have been excluded and the claims withdrawn from the consideration of the jury. To allow them to remain in the case was an error,

and any instruction given afterwards, short of their withdrawal, was unavailing to cure it."

(b) THE INSTRUCTION SET FORTH IN HAEC VERBA WOULD LEAD THE JURY TO BELIEVE THAT THERE WAS AN ISSUE AS TO WHETHER THE GIFT WAS MADE IN "GOOD FAITH" AND AN ISSUE ON WHEN THE GIFT WAS INTENDED TO TAKE EFFECT.

These issues did not enter into the trial of this case. The Revenue Act of 1918, Section 401, provides for the [6] amount of tax upon the net estate of every decedent. Section 402 (c) provides that there shall be included in the gross estate among other named interests of the deceased, the following:

> "To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this act), except in case of a *bona fide* sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been

made in contemplation of death within the meaning of this title."

It will be seen that "good faith" does not enter the issues by force of the statute. Furthermore, the pleadings do not raise the issue of good faith.

Nor was there any issue in the trial of this action on the time when the transfer was intended to take effect in possession or enjoyment. The record shows that there was never any issue on either this point or on the point that a fair consideration in money or money's worth was given in exchange for the transfer. The opening statement of counsel for both sides, we believe, will show that it was admitted that an outright gift was made by William H. Mackinnon to his wife of a material part of his property thirty days prior to his death, and that it was at all times purely a gift and it was not a transaction of sale supported by a consideration in money or money's worth. The plaintiff therefore feels that this instruction was erroneous and that the giving of it prevented the plaintiff from having a fair trial. [7]

Counsel not having the reporter's transcript covering the last day's proceedings at hand in the preparation of this motion, we are unable at the present time to ascertain whether a motion was made to exclude the evidence on counterclaim and whether an exception was preserved. Counsel does, however, remember of making a motion for directed verdict on the counterclaim; but whether the request was made or an exception taken does not make any difference because the trial court may in the exer-

cise of its judicial discretion grant a new trial if convinced that its charge was wrong, even though its attention was not called to the error complained of before the case was finally submitted to the jury.

Railway Company vs. Heck, 102 U. S. 120

II.

NO EVIDENCE TO SUSTAIN THE VERDICT.

Without proof of presentation, this being an action for debt and not for taxes, defendants have not proved facts sufficient to sustain the verdict

United States vs. Patterson, 91 Fed. 854.

United States vs. Gilmore, 74 U. S. 491.

Although the defendants were given the greatest of latitude by the rulings of the Court in the admission of evidence as to all the conversations as will be seen by the ruling of the Court in

Kyle vs. Craig, 125 Cal. 107, 113,

they have not introduced one iota of proof tending to show Mr. Mackinnon's intention at the time that he made the transfers.

III.

SAID VERDICT IS NOT SUSTAINED BY THE EVIDENCE.

(a) United States vs. Patterson, 91 Fed. 854.

United States vs. Gilmore, 74 U. S. 491. [8]

(b) Revenue Act 1918, sec. 401, sec. 403, subd. 4.

(c) The most that the evidence shows is that the deceased intended for some time to transfer his property to his wife, and that on Christmas Day he joined in the usual Christmas Day celebration,

carved the turkey and served the champagne, and that although confined to his room for the last two weeks of his life, that he was sitting up every day. There is absolutely no evidence of any conversation had with the deceased at or near the time of the transfer, nor is there any evidence aside from what has been mentioned here of any demeanor or conduct upon his part that would lend any aid in determining what the intention of the deceased was at the time that he made the transfer. No one was present other than his wife at the time that he handed her the deeds. She testified (Tr. 25) that there was no conversation other than, "Here —— (wife) take these; these are yours." The mere fact that he was everlastingly speaking of taking trips certainly has no bearing on whether the deceased at the time that he handed the deeds to his wife did not contemplate death in the reasonably near distant future. Therefore, giving the evidence the best possible view to support defendants' contention the proof fails to overcome the presumption that the transfer was made in contemplation of death.

IV.

PREPONDERANCE OF EVIDENCE AGAINST THE VERDICT.

In addition to the presumption, the admissions of the defendants' witnesses show that the deceased was not feeling well at the time the transfers were made (Tr. 88, 26); that the deceased had been suffering with chronic colds for the few months next preceding his death (Tr. 90); that his legs were

swollen (Tr. 90, 95), and that doctors were called in [9] within a few days after the transfer was made (Tr. 84, 71, 26). The evidence shows further that William H. Mackinnon was 63 years 11 months at the date of his death, that he was 5 feet 10½ inches tall and weighed in the neighborhood of 300 pounds (Tr. 18, 23); he was a retired business man; he was a man who never ever complained to anybody about his health (Tr. 17, 43, 74, 88).

The evidence shows further that he closed his bank account and transferred to his wife $387,968.93 in real property out of a total estate of $496,496.24 less than one month prior to his death from heart trouble (Tr. 89, 76); that he told his attorney after the transfer was made that he was a "pauper" now (Tr. 32); that he incidentally called his son-in-law attorney to his home in order to give him instructions for drawing the deeds, ordering the attorney to draw them up and bring them back to the house instead of taking care of the matter on one of his trips to the office where he would have found the son-in-law who was sharing the office with Mr. Mackinnon. Instead, it seemed to be a rush proposition up until the deeds were actually made out and handed to the wife.

Thereafter, we have a man who seemed to be pleased with himself to the same extent as if he had just recently executed his will after worrying about it for some time and in the same fashion we find him advising the respective members of the family that he had just given all of his property to the mother. It would be easy to expect the same in-

formation to be imparted to the children had he just designated his wife as sole beneficiary of all of said property in a recently executed will. [10]

This evidence introduced by the defendants, instead of overcoming the presumption, shows most convincingly that the legal presumption should prevail in this case.

Service of the within notice by copy admitted this 16th day of Oct., 1929.

CAREY VAN FLEET,
Attorney for Defts.

[Endorsed]: Filed Oct. 16, 1929. [11]

At a stated term of the Southern Division of the United States District Court for the Northern District of California held at the courtroom thereof, in the City and County of San Francisco, on Friday, the 18th day of October, in the year of our Lord one thousand nine hundred and twenty-nine. Present: The Honorable FRANK H. NORCROSS, District Judge.

[Title of Court and Cause.]

MINUTES OF COURT—OCTOBER 18, 1929—ORDER DENYING MOTION FOR NEW TRIAL.

This case came on regularly this day for hearing of plaintiff's motion for a new trial of the issues

herein, and after being argued by counsel for respective parties, the Court ORDERED that said motion be and the same is hereby denied. [12]

[Title of Court and Cause.]

PRAECIPE FOR SUPPLEMENTAL TRANSCRIPT OF RECORD.

To the Clerk of Said Court:

Sir: Please prepare certified stenographic supplemental transcript of record on appeal herein as follows:

(1) Petition for new trial.

(2) Order denying new trial.

Service of the within praecipe by copy admitted this 1st day of Nov., 1930.

CAREY VAN FLEET,
Attorney for ————.
GEO. J. HATFIELD.
GEO. J. HATFIELD,
United States Attorney,
By CHELLIS M. CARPENTER,
CHELLIS M. CARPENTER,
Asst. United States Attorney,
(Attorneys for Plaintiff.)

[Endorsed]: Filed Nov. 1, 1930. [13]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO SUPPLEMENTAL TRANSCRIPT OF RECORD.

United States of America,
Northern District of California,—ss.

I, Walter B. Maling, Clerk of the United States District Court in and for the Northern District of California, do hereby certify that the foregoing is a true and full copy of the original petition for a new trial filed Oct. 16, 1929, order denying new trial, dated Oct. 18, 1929, and praecipe for additional record on appeal, filed Nov. 1, 1930, in the cause entitled United States of America vs. Frances Mackinnon Pusey et al., No. 18,342—K. as the same remains of record and on file in the office of the Clerk of said court.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the aforesaid court at San Francisco, this 5th day of November, A. D. 1930.

[Seal] WALTER B. MALING,
Clerk.

By ————————,
Deputy Clerk. [14]

[Endorsed]: No. 6126. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Frances Mackinnon Pusey, George G. Mackinnon, William H.

Mackinnon, Jr., Frances Mackinnon Coit and John S. Delancey, Guardian of John Mackinnon Delancey, a Minor, Appellees. Supplemental Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed November 5, 1930.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.